

No. 15-1085

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**In the Supreme Court of the United States**

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WESTERNGECO LLC,  
*Petitioner,*

*v.*

ION GEOPHYSICAL CORPORATION,  
*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

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**REPLY TO BRIEF IN OPPOSITION**

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## REPLY TO BRIEF IN OPPOSITION

ION does not dispute that the Federal Circuit’s decision squarely raises the question whether plaintiffs can be categorically barred from recovering lost profits caused by infringement under 35 U.S.C. § 271(f). Nor does ION dispute that the Federal Circuit is divided on the answer: the panel majority and multiple dissenting judges each claim that the same centuries-old decisions of this Court compel opposite answers. *Compare* App.24a-25a, *with* App.36a-37a. Dissents at the panel and rehearing stages further demonstrate the importance of the question presented and division within the Federal Circuit. *See, e.g.,* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 890 (2016); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 356 (2015); *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920 (2015); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014); *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670 (2012).

Nor does ION dispute that the Federal Circuit’s decision is inconsistent with copyright law’s predicate act doctrine—which is another reason to grant certiorari. *Compare* *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (laches generally not a defense under Copyright Act), *with* *SCA Hygiene Prods. v. First Quality Baby Prods.*, No. 15-927, 2016 WL 309607 (2016) (granting certiorari to decide similar laches issue under Patent Act).

In opposing certiorari, ION explicitly dodges the questions presented, Brief in Opposition (“BIO”) i-iv, and offers a litany of distractions. Tellingly, ION devotes a considerable portion of its brief to addressing an argument WesternGeco does not make—that the

presumption against extraterritoriality should be eliminated. *Id.*; BIO 12-13. ION mischaracterizes pending collateral litigation in the Patent Office and speculates on the future result. To be clear, proceedings in the Patent Office cannot moot the question before this Court, regardless of their outcome. No party has succeeded in challenging the validity of two patent claims that ION infringes, which is sufficient to support lost profits.

ION refers to arguments it made below that were not reached, and even to arguments ION deliberately did not make. *See, e.g.*, BIO 2 (validity). ION essentially argues that if this Court grants review and reverses, ION may have more arguments on remand. That objection is readily answered by the final fifteen words of nearly every opinion of this Court that does not affirm the judgment it reviews: “the case is remanded for further proceedings consistent with this opinion. It is so ordered.” *See, e.g., Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016); *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016); *Commil*, 135 S. Ct. at 1931; *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 843 (2015) (similar); *Highmark*, 134 S. Ct. at 1749. The prospect of further proceedings after review on the merits is not a reason to deny certiorari. Congress enacted § 271(f) to overrule this Court’s *Deepsouth* decision, and the court of appeals has announced a rule of law that drastically reduces the effect of that legislation. That decision raises an important, disputed issue that warrants this Court’s review.

ION does not dispute any of WesternGeco’s arguments for holding this petition for *Halo* and *Stryker*; instead, it argues waiver. BIO 18-20. ION is

wrong. WesternGeco argued in district court for enhanced damages, and appealed the denial. The district court and the Federal Circuit denied enhanced damages by applying the then-binding rule of law now under review in *Halo* and *Stryker*. No more is required to hold this petition.

**I. This Court Should Review the Question Whether Plaintiffs Can Be Categorically Barred From Recovering All of Their Lost Profits Under 35 U.S.C. § 271(f).**

A divided panel of the Federal Circuit announced a legal rule that drastically undercuts the effectiveness of § 271(f), a statute Congress passed in response to *Deepsouth*. Petition (“Pet.”) § I.A. The court of appeals made the unprecedented decision to apply the presumption against extraterritoriality—not to liability, but to limit the *type* of damages available for what is indisputably an act of infringement occurring within the United States. ION neither disputes the importance of the first question presented, nor does ION cite any case where this Court has ever applied the presumption against extraterritoriality to *damages* after liability has been established. ION also identifies no other court or decision that has applied the presumption against extraterritoriality to find that some (but not all) damages are unavailable for an act of U.S.-based infringement. That is unsurprising because the panel’s approach conflicts with binding precedent of this Court. Pet. §§ I.B-C.

Instead, ION argues about an entirely different question not raised by the petition, claims the conflict between the panel decision and the predicate act doctrine is waived, and disputes the suitability of



this case as a vehicle. ION's arguments are without merit.

**A. ION's Opposition Illustrates the Inconsistency Between the Panel Decision and This Court's Precedent.**

1. Echoing the panel majority's reasoning, App.20-23a, ION's main argument is that the court of appeals was correct because it places damages for infringement under § 271(f) on equal footing with damages for other acts of infringement under § 271. BIO 7-12. As Judge Wallach's dissent and the petition explain, that rationale misses the mark. App.48a-50a; Pet. 23-26.

The panel majority does *not* place § 271(f) on equal footing with other acts of infringement. For other types of infringement, so-called "foreign lost profits" are recoverable. An infringer who makes infringing widgets in the United States (violating § 271(a)) and sells them in Canada can be made to pay lost profits if the patentee shows that the infringement caused the patentee to lose sales. *Goulds Mfg. Co. v. Cowing*, 105 U.S. 253, 256-57 (1881); Pet. 22-23. The Federal Circuit seemed to recognize that principle in *Carnegie Mellon*, a case of infringement under § 271(a), explaining that "once one extends the extraterritoriality principle to confining how *damages* are calculated, it makes no sense to insist that the action respecting the product being used for measurement itself be an *infringing* action." *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 807 F.3d 1283, 1306 (Fed. Cir. 2015), *reh'g en banc denied in part*, 805 F.3d 1382 (Fed. Cir. 2015).

But the court of appeals' decision in this case holds that the same principles do not apply to dam-

ages for infringement under § 271(f), characterizing WesternGeco’s lost profits as being for “foreign use.” WesternGeco’s petition does not ask the Court to find that “foreign use” is an act of infringement. ION’s infringement under § 271(f) is enough. WesternGeco simply asks that ION be held accountable for the foreseeable (and intended) consequences of its infringement in the United States.<sup>1</sup>

ION relies heavily on the Federal Circuit’s decision in *Power Integrations*, BIO 8-10, 12-13. *Power Integrations* does not bind this Court, nor does it hold that lost profits resulting from U.S. infringement are categorically unavailable for infringement under § 271(a). In *Power Integrations*, the patentee’s damages claim sought to reach wholly foreign conduct that was not infringement at all:

[T]he worldwide sales measure of damages encompasses [defendant’s] activities outside the United States which *cannot be considered infringing* under *Microsoft*. [The patentee’s] estimate of ... damages was *not* related to parts that were manufactured, used, or sold in the United States ..., and was *not* based on parts that were imported into the United States ....

*Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 589 F. Supp. 2d 505, 510-11 (D. Del. 2008) (first emphasis added), *vacated*, 711 F.3d 1348 (Fed. Cir. 2013). In confirming that the district court correctly rejected that damages theory, the Federal Cir-

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<sup>1</sup> *Brown v. Duchesne*, 60 U.S. 183 (1856), is inapposite. BIO 20. In *Brown*, no U.S. patent rights had been infringed. 60 U.S. at 198-99.

cuit relied on *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), which explained that U.S. laws should not be applied “to foreign *conduct* insofar as that conduct *causes independent foreign harm* and *that foreign harm alone* gives rise to the plaintiff’s claim.” *Power Integrations*, 711 F.3d at 1372 (quoting *id.* at 165 (emphasis altered)), *cert. denied*, 134 S. Ct. 900 (2014). As Judge Wallach explained—and as the author of *Power Integrations* agreed—*Power Integrations* was “concerned with the sufficiency of the connection between the foreign activity and the domestic infringement,” and “merely applie[d]” principles of proximate causation and foreseeability to the damages award in that case. App.44a; *see also* App.154a (Reyna, J., joining dissent).

Here, however, there is no dispute that ION violated § 271(f) by its conduct *in the United States* and that the jury’s damages award covered harm that flowed directly and foreseeably from that intentional conduct. Pet. 9-10.

2. ION also relies on *Microsoft v. AT&T*, 550 U.S. 437 (2007), and argues that WesternGeco’s petition directly attacks *Microsoft* and the presumption against extraterritoriality itself. BIO iii. Not so.

*Microsoft* was explicitly concerned with *liability* under § 271(f), and explained that the presumption against extraterritoriality applied in determining what actions are subject to liability under § 271(f). *Microsoft* held, based in part on the presumption against extraterritoriality, that “foreign-made copies of Windows actually installed on the computers were supplied from places outside the United States,” and thus could not be components “supplied *from* the

United States” under § 271(f). 550 U.S. at 452. The issue was thus whether the alleged *acts* that occurred outside the United States constituted *infringement* under § 271(f).

There is no dispute here that ION committed infringement under § 271(f)(1) and (f)(2) by supplying components *from the United States* in the manner the statute forbids. The jury found ION liable, the district court denied JMOL, and the court of appeals unanimously affirmed. App.13a-18a, 32a, 148a-149a. The infringing acts here indisputably all occurred within the United States. The dispute is the extent to which WesternGeco can recover damages “for [ION’s] infringement” under 35 U.S.C. § 284.

Nor is WesternGeco’s petition an attack on the presumption against extraterritoriality, as ION contends. BIO 12-13. ION argues that “[i]f this presumption were overruled, all infringers could be liable for any damages anywhere in the world where the patent owner can trace some connection between acts in the United States and [a] claim for damages ....” *Id.* WesternGeco does not seek to overrule the presumption against extraterritoriality, nor would a ruling in WesternGeco’s favor have the consequences ION alleges. As the petition noted, and ION ignores, patent infringement is a tort, Pet. 25-26, and damages in any tort case are appropriately limited by principles of proximate cause and foreseeability. *Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 691-92 (2012) (Scalia, J., concurring) (“Life is too short to pursue every event to its most remote, ‘but-for,’ consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off

otherwise endless chains of cause-and-effect.”); App.44a (Wallach, J., dissenting).

The issue is not whether the presumption against extraterritoriality should be overruled. Rather, it is whether the presumption against extraterritoriality applies to limit *damages* under 35 U.S.C. § 284, when it is undisputed that the infringing conduct occurred in the United States, and the damages are the proximate cause of the infringement. Pet. 23-24. The Federal Circuit’s application of the presumption against extraterritoriality to limit the type of damages available for acts of U.S. infringement is unprecedented, and cuts off an entire category of damages without any “explicit[]” instruction from Congress. *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 653 (1983).

**B. ION Has No Answer for the Panel Decision’s Conflict With the Predicate Act Doctrine.**

ION does not dispute that the panel created a patent-specific rule for damages in conflict with the predicate act doctrine that the regional circuits consistently apply in copyright cases. Pet. § I.D.

ION’s only response is to claim that the argument is waived. BIO 14. Litigants waive issues, not arguments. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99-100 (1991). The *issue* of WesternGeco’s entitlement to damages was squarely before the court of appeals—it was one of the bases of ION’s appeal. The conflict between the rule of law the court of appeals announced and the predicate act doctrine is not a factual issue; it is a legal reason to doubt the correctness of the decision below and a legal inconsistency that supports certiorari review

here. In other words, it is an additional reason why the decision below was wrong. ION's failure to provide any substantive response further underscores the need for review.

**C. Neither Collateral Patent Office Proceedings Nor ION's Factual Arguments Counsel Against Review.**

ION's two "vehicle" arguments are unsound. BIO 13, 16.

*First*, collateral administrative proceedings at the Patent Office cannot moot lost profits in this case. BIO 5-6, 13-14. Lost profits were based on one or more patent claims being infringed and not invalid. App.153a (Verdict form: "If *any* claim is infringed and not invalid, what damages do you find Western-Geco has proven ...?") (emphasis added). The Patent Office proceedings only question the validity of a subset of claims ION was found to infringe. Even if ION's speculation about the outcome of those proceedings comes to pass, at least two patents will remain with valid claims infringed under §§ 271(f)(1) and (f)(2): the '520 patent (claim 23), and the '038 patent (claim 14). BIO 4-6; App.148a-149a; see *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1357 (Fed. Cir. 2001) ("Lost profit damages do not depend on the number of patents infringed by one single product ...."). ION concedes that at least claim 23 of the '520 patent was included in the lost profits analysis, BIO 16 (referring to claim 23 as one of the "patent claims that support lost profits"), and ION never contested that a single valid and infringed would support lost profits. *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 757 F.3d 1366, 1370 (Fed. Cir. 2014) (argument "that

the damages award must be revisited if either one of the two products at issue are found not to infringe ... could have and should have been raised in the previous appeal.”), *cert. denied*, 135 S. Ct. 1843 (2015). ION cannot argue otherwise for the first time now. Everyone who has challenged these two claims, whether in district court or at the Patent Office, has failed, and the pending proceedings ION references do not challenge these claims. Patent Office proceedings therefore cannot moot the first question presented.<sup>2</sup>

*Second*, ION asserts “there is no competition between ION ... and WesternGeco” and “[t]he factual disconnect will ultimately prevent the Court from fully resolving the extraterritoriality issues.” BIO 13. That makes no sense: the jury expressly found that ION’s infringement caused WesternGeco to suffer lost profits. App153a. No court has disturbed that finding. Direct competition is not a prerequisite to lost profits, and it is well-established that damages are based on the patentee’s loss, not the infringer’s gain.<sup>3</sup> *See, e.g., Yale Lock Mfg. Co. v. Sargent*, 117 U.S. 536, 552 (1886); *Coupe v. Royer*, 155 U.S. 565,

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<sup>2</sup> Although ION presents the Patent Office proceedings as a *fait accompli*, the magistrate judge recognized that ION was “merely speculating [as to] the[ir] outcome,” and recommended that final judgment be entered and WesternGeco be permitted to collect its royalty damages. *WesternGeco LLC v. ION Geophysical Corp.*, No. 4:09-cv-01827, 2016 WL 2344347, at \*10, \*13 (S.D. Tex. May 4, 2016).

<sup>3</sup> ION is wrong to suggest that WesternGeco had to appeal the lost-profits jury instruction. BIO 16-17. WesternGeco prevailed on that issue and could not have appealed. *See Lindheimer v. Ill. Bell Tel. Co.*, 292 U.S. 151, 176 (1934).

582 (1895); Pet. 17-18, 21. ION’s desire to resurrect that argument in the event of a remand is no reason to deny review.

## **II. WesternGeco Has Not Waived a Hold for *Halo* and *Stryker*.**

ION argues that “[s]ince WesternGeco did not raise the issues on willfulness in *Halo* and *Stryker* in its own appeal, it cannot raise them for the first time now in a GVR request.” BIO 20. WesternGeco was not required to anticipate potential changes in the law, BIO 18-19, or to make futile requests of the courts below to change the law. *Id.* at 20; *cf. Halo El-ecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1386 (Fed. Cir. 2014), *cert. granted*, 136 S. Ct. 356 (2015) (O’Malley, J., concurring) (“[W]e are bound by *Seagate* and *Bard* as a panel....”).

What matters, and what ION does not dispute, is that WesternGeco appealed the district court’s decision not to enhance damages under 35 U.S.C. § 284, and that the district court and the Federal Circuit both denied WesternGeco enhanced damages by applying the legal rule—*Seagate*’s holding that willfulness (defined by a two-prong test) is a prerequisite to enhancing damages—now at issue in *Halo* and *Stryker*. App28a-30a; App83a-90a.

No more is required to hold the petition for a possible GVR. Should *Halo* and *Stryker* revise or overturn Federal Circuit precedent, a GVR would “alleviate[] the potential for unequal treatment that is inherent in [the Court’s] inability to grant plenary review of all pending cases raising similar issues ....” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). That is why this Court has routinely issued GVR orders to the Federal Circuit to consider intervening decisions.



*See, e.g., Medtronic Sofamor Danek USA, Inc. v. NuVasive, Inc.*, 136 S. Ct. 893 (2016) (GVR for consideration of *Commil*); *CardSoft, LLC v. Verifone, Inc.*, 135 S. Ct. 2891 (2015) (GVR for *Teva*); *CSR PLC v. Azure Networks, LLC*, 135 S. Ct. 1846 (2015) (same); *WildTangent, Inc. v. Ultramercial, LLC*, 134 S. Ct. 2870 (2014) (GVR for *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014)).

That ION may have additional arguments on remand, BIO 18, is no reason not to order the remand in the first place. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 515 (2006).

### CONCLUSION

The Court should grant the petition for a writ of certiorari or, at a minimum, hold the petition for *Halo* and *Stryker*.

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